

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

M. COSTA, JOE H. COSTA AND JOHN SILVA,
Libellants and Respondents,

VS.

GASOLINE POWER BOAT "NOE G.",
Defendant and Appellant.

Appeal from the District Court of the United States of America
in and for the Southern District of California.
Hon. Oscar A. Trippet, Judge of the
United States District Court.

**Defendant and Appellant's Points
and Authorities**

Filed

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Filed this day of January, 1916

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No. 2689.

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PRELIMINARY STATEMENT

This case was tried to the court and a judgment rendered in favor of the Libellants and Respondents herein for the sum of One Thousand, Two Hundred and Fifty Dollars (\$1250.00) on the theory that each vessel was at fault, and each should bear one-half of the loss.

The case arose over a collision between the gasoline power goat Noe G. owned and operated by Onerati Chappi, and the gasoline power boat L'Etruria, owned and operated by M. Costa, Joe H. Costa and John Silva, off the coast of Baja California, Mexico, between Santa Tomas and China Points on the 3rd day of November, 1914, at about 7:45 o'clock A. M. The evidence in the case clearly discloses, and it is admitted by both parties to the action, that the L'Etruria was traveling in a south-

erly direction, and that the Noe G. was traveling in a northerly direction at the time the collision occurred, and that at the time of the collision, and for some time prior thereto, there had been a heavy fog.

ARGUMENT.

I.

The court found in addition to the fact that at the time of the collision, and for some time prior thereto, that both boats had been running in a fog, and that the gasoline power boat L'Etruria had not been blowing her fog horn; that the lookout on the L'Etruria sighted the Noe G. when the two boats were from forty to fifty feet apart; that the said Noe G. was dead ahead of and on a course bearing directly to the L'Etruria; that at the time the lookout on the L'Etruria sighted the Noe G., he immediately ported his helm and went to starboard.

II.

That the Noe G. did not sight the L'Etruria until she was from within ten to fifteen feet of the said L'Etruria, and that had the lookout been properly manned and attending to his duties, he could have made out the L'Etruria when she was at least forty or fifty feet distant; that the said Noe G. held her course and did not go to starboard after she sighted the L'Etruria, striking the L'Etruria on her port bow just forward of the chain plate, breaking a large hole in said L'Etruria through which the sea entered so rapidly that within a few minutes after the said collision, the said L'Etruria sank, together with her engine, tackle, apparel, etc., and that Libellants and Respondents were damaged through the

loss of the L'Etruria, her engine, tackle, apparel, furniture, etc., in the sum of Twenty-five Hundred Dollars (\$2500.00); that the Noe G. was not damaged.

As Conclusions of Law from the aforesaid Findings of Fact, the Court found

First: That the L'Etruria was negligent in not blowing her fog horn prior to the collision,

Second: That the Noe G. was negligent in not keeping a proper and sufficient lookout and in not going to starboard when she sighted the L'Etruria.

These purported Conclusions of Law, we respectfully urge are not Conclusions of Law but Findings of Fact, and we treat them herein accordingly, and counsel respectfully urge that these Findings of Fact are insufficient to support the judgment.

That the court erred in rendering judgment for the plaintiff on the facts found, and that it was conclusively shown by the evidence that Libellants and Respondents have no cause of action;

That the evidence is wholly insufficient to sustain any findings of negligence on the part of the owners or operators of the libelled gasoline power boat Noe G. at, or before, the happening of the collision.

Further, that the evidence in the case does not warrant a finding that Defendant and Appellant was guilty of negligence.

Further, that if there was any act committed by Defendant and Appellant that was erroneous, or that might be contended to be a negligent act on the part of Defendant and Appellant, that it was a minor fault, and that if they committed an error in the management and

operation of the said power boat, that it was an *error in extremis* committed in a moment of impending peril in order to avoid a catastrophe made imminent by the mismanagement of those in charge of the L'Etruria.

Further, that the evidence clearly shows that the L'Etruria was guilty of gross negligence, and that such gross negligence on the part of the L'Etruria and her crew was the direct cause of the injury.

We respectfully submit that in this case, an attempt is made to saddle on the power boat Noe G. and her owner a liability for an accident caused by the gross negligence and carelessness of the L'Etruria and her crew; that the Noe G. was not guilty of an act or omission which could be truthfully said to be the direct cause of the injury; that the Noe G. had violated no rule of the road or regulation pertaining to the operation and control of vessels upon the high seas, but that the owners and operators of the L'Etruria, according to the testimony of their own witness, were violating several of the rules of the road in reference to the management and operation of vessels upon the high seas:

First: In operating their vessel in foggy weather without providing and operating a horn and whistle, or making any alarm sufficient to notify other vessels of their approach or proximity.

Second: By not having a proper lookout properly attending to his duties.

Third: By running their vessel at a greater rate of speed than the rules for the management of vessels upon the high seas in times of fog provide.

And further, we submit to this Honorable Court that

the preponderance of the evidence in this case shows that just prior to, and at the time of the collision, no member of the crew of the L'Etruria was at the wheel attending to his duties. The evidence conclusively shows, in our opinion, that a man competent and skilled was at the wheel of the Noe G.; that another man competent and skilled was acting as lookout and assisting in sounding an alarm to warn other vessels of their approach by operating a fog horn; that the Noe G. was proceeding at a moderate rate of speed not to exceed three miles per hour; that the man at the wheel of the Noe G. discovered the L'Etruria when she was distant something like forty to fifty feet; that the lookout also discovered the L'Etruria at about the same time, or possibly an instant later, than she was discovered by the man at the wheel; that the man at the wheel of the Noe G. immediately took what he deemed under the circumstances to be proper means of avoiding a collision, which he realized was imminent, and that everything was done by the crew of the Noe G. that was required of them, or would be required of a reasonable and cautious crew, to prevent an accident.

We will first take up the question of what was done by the man who was supposedly at the wheel of the L'Etruria in reference to the finding that the lookout on the L'Etruria when he sighted the Noe G. immediately ported his helm and went to starboard, and call the Court's attention to the testimony of J. H. Costa who was claimed by Libellants and Respondents to have been at the wheel of the L'Etruria at the time of the collision. Reading from Page 3 of the Transcript, commencing at Line 17:

“Q. When you first saw the Noe G. what did you do, if anything?”

A. I tried to turn to the right—the right hand side.

Q. How far to the right did you turn? What is the trouble?

A. He says he was going south. I am trying to ask him what distance when he saw the Noe G.—what distance he went out of his course, and he says he went south.

Q. Ask him how much to the right he went, not out of his course, but how much to the right he went.

A. He says at least fifteen feet.

The Court. Went to the right fifteen feet before he struck?

A. He says about that.

The Court. That is, he went fifteen feet out of the course. Is that what he means?

A. Yes, sir. He saw the boat and turned the rudder and he turned about fifteen feet out of his course.”

Also call the Court’s attention to the testimony of this same witness on Page 3 of the Transcript at line 9:

“*The Court.* How far apart were they when he saw it?

A. About 50 feet.”

Also, to the testimony of the same witness, page 5 of the Transcript, line 23:

“Q. How fast was the L’Etruria traveling?

A. He says, about seven or seven and a half miles an hour.”

This testimony, we respectfully urge is not worthy of consideration, for the reason that it was an impossible performance to have turned his boat fifteen feet out of its course in a distance of fifty feet, the boat traveling at the rate of speed of seven to seven and one-half miles per hour, as testified by this witness. This is all the testimony on the part of Libellants and Respondents tending in any way to support this finding.

In contradiction of this, we have the testimony of Appellant's witness Oscar Peuna that when he first saw the L'Etruria she was ten or fifteen feet from the Noe G., his attention having been called to it by the cry of alarm by the man at the wheel of the Noe G., page 20 of the Transcript commencing at line 26:

"Q. How far away was the L'Etruria when you first saw it?

A. About ten or fifteen feet.

The Court. Ten or fifteen feet?

A. When he saw it first.

The Court. Ten or fifteen feet apart?

A. Yes.

The Court. And who called his attention to it?

A. The man that was on the watch."

Page 21 of the Transcript commencing at Line 10, quoting same witness:

"*The Court.* They were only about ten feet apart then?

A. Yes, sir, about ten or fifteen feet apart.

Q. Which way was the L'Etruria headed?

A. The L'Etruria was going south.

Q. Did the L'Etruria change her course after you first saw her?

A. No, sir.

Q. Did you see anybody on the L'Etruria at that time?

A. I didn't see nobody."

Page 24 of the Transcript, commencing at Line 11, quoting from the testimony of the same witness:

"Q. And the L'Etruria did not change her course at all?

A. I don't think so, because I didn't see nobody on deck."

Dosa Peo Pela, another of Appellant's witnesses, testifies as follows:

Page 31 of the Transcript, commencing at Line 6:

"Q. When did you first see the L'Etruria?

A. He says, I was about forty feet when I saw it first, and he hollered that there was a boat ahead of them, and he told another fellow to reverse the engine at full speed.

Q. Did you see anybody on the L'Etruria when you first saw it?

A. He says, not before they came to a collision. The only thing he saw after they came together one from out from the cabin with a cigarette paper in his hand.

Q. What part of the boat did he come from?

A. From the cabin of the boat, from his engine.

Q. Was he smoking that cigarette?

A. No, he was holding these papers in his hand to make cigarettes.

Q. Who was that man?

A. He says only he knew him by sight. It was the brother of the fellow that owned the boat."

Page 32 of the Transcript, commencing at Line 9, quoting from the same witness:

"Q. Did the L'Etruria change its course after you saw them when they were forty feet away?

A. No, sir."

Page 33 of the transcript, commencing at Line 14, cross-examination of the same witness:

"Q. If Mr. Peuna says that the L'Etruria was between ten to fifteen feet away when you first saw her, he was mistaken, wasn't he?

Mr. Chambers. We object that Mr. Peuna did not say that he was in the same position that this witness was.

The Court. Translate the question and ask it.

A. He says—when I saw the boat it was about forty feet but to reverse the engine, and they were still going ahead when the rest of them saw it. Perhaps it was that time when they saw it. But we saw it before anybody else saw it."

Antonio Levaro, another of Appellant's witnesses, testified as follows:

Page 41 of the Transcript, commencing at Line 9.

"Q. How far was the L'Etruria from the Noe G. when you first saw it?

A. He said it was about forty feet."

Page 42 of the Transcript, commencing at Line 24, quoting from the same witness:

"Q. Did the L'Etruria change her course after you first saw her?

A. No, he said straight ahead without nobody on deck.”

Page 47 of the Transcript, commencing at Line 7, quoting from the same witness:

“Q. Did the L’Etruria change its course after you saw it?

A. It was going straight ahead.”

Noe Chappi, another of Appellant’s witnesses, testified as follows:

Page 50 of the Transcript, commencing at Line 15.

“Q. Could you see whether there was anybody at the wheel of the L’Etruria from where you were?

A. He said, he couldn’t see no one. He said they had a glass but if there was, he could see them.

Q. If there was anyone there, you could see them?

A. Yes.

Q. Was there anyone there at the wheel when you looked up?

A. No, I didn’t see nobody.

Q. When did you first see anybody on the L’Etruria?

A. When we came in collision he saw the fellow come down with a cigarette paper in his hand.”

Gerald Brigante, another of Appellant’s witnesses, testified as follows:

Page 56 of the Transcript, commencing at Line 17:

“Q. He stated to you at that time there was no one on deck of the L’Etruria?

A. He said there was nobody on the deck.

Q. What was it he said about his brother rolling this cigarette?

A. He said, my brother was down in the hold making a cigarette for himself. That is all he said. He didn't give me any of the other information at all."

Page 58 of the Transcript, commencing at Line 11, quoting from the same witness:

"Q. What did he say?

A. I said, 'Did you see that, the boat Noe G. when she came against you?' And he said, 'No, I was below sleeping.' I said, 'Who was on guard when that came?' He said, 'My brother was on the road,' but he said, 'Just that minute he was in the hold making a cigarette for himself,' and that is all, and he said, to me, Well, I see the man was very sorry, and he says, 'I wish I sunk with the boat myself.' He means to say that he was very sorry. He didn't say nothing else."

This testimony, we respectfully urge, disposes of the question of the finding that at the time the lookout on the L'Etruria sighted the Noe G. he immediately ported his helm and went to starboard.

We will next take up the finding that the Noe G. did not sight the L'Etruria until she was within from ten to fifteen feet of the said L'Etruria. That had the lookout been properly manned and attending to his duties, he could have made out the L'Etruria when she was at least forty to fifty feet distant, and we respectfully urge that the evidence shows that the Noe G. had a lookout stationed at his proper place and in the discharge of his

duties, and that said finding is erroneous, and call the Court's attention to the testimony of Oscar Peuna, page 26 of the Transcript, commencing Line 23:

The Court. Who else was on deck beside the lookout and you?

A. Antonio Levaro.

The Court. Where was he?

A. Just one side of the man that was steering the boat.

The Court. And he was standing near the wheel, what was he doing at the time?

A. I was cleaning fish. He was sounding the whistle and giving an alarm.

The Court. Go ahead.

Q. You say they had been sounding the fog horn ever since the fog first settled down?

A. From the time we started, because it was foggy when we left.

Q. What kind of a horn was it?

A. It was a steam whistle from the steam engine.

Q. How often was he sounding it?

A. In the neighborhood of two minutes, or probably two and a half.

Q. Did he have anything to go by?

A. No, I was cleaning fish, but the man that was managing that had a watch alongside of him."

Dosa Peo Pela, another of Appellant's witnesses, testifies as follows:

Page 31 of the Transcript, commencing at Line 3.

"Q. Who blew the whistle?

A. He says he blows the whistle himself at first, and the other, Antonio Levaro he says he was blowing the horn."

Antonio Levaro, another of Appellant's witnesses, testifies as follows:

Page 42 of the Transcript, commencing at Line 27.

"The Court. Where were you standing with reference to the man at the wheel?

A. He said he was standing about four feet from the man that was on the wheel.

Q. On which side?

A. The left side of the boat. The port side.

Q. Which way were you looking?

A. He said I was looking in every direction.

By the Court. Q. How comes it that you did not see the L'Etruria first?

A. He says that the man on the wheel saw it first.

Q. Was it plain to be seen when you saw it?

A. Not very well, it was so foggy."

We will now take up the question of the finding that the Noe G. was negligent in not going to starboard when she sighted the L'Etruria, and we respectfully submit that the evidence is insufficient upon which to base such a Finding of Fact, and that the evidence clearly discloses that on account of the gross negligence on the part of the crew of the L'Etruria in carelessly and negligently operating said vessel, placed herself by her own carelessness and wrong maneuvering in a position where the accident was inadvertible, and that the crew of the Noe G. did everything that a reasonable, prudent

and cautious crew should, or could have done under the circumstances to prevent an accident. In support of this contention, we call attention to the testimony of J. H. Costa, Libellants' own witness, page 3 of the Transcript, commencing at Line 6:

“Q. Where was the Noe G. with reference to the L'Etruria, in front or on one side?

A. He says it was coming right straight for him.

The Court. How far apart were they when he saw it?

A. About fifty feet.

The Court. Was there a dense fog at that time?

A. Yes, sir.”

Testimony of the same witness, page 5 of the Transcript, commencing at Line 23:

“Q. How fast was the L'Etruria traveling?

A. He says about seven or seven and one-half miles an hour.”

Testimony of the same witness, page 6 of the Transcript, commencing at Line 24:

“*The Court.* How long was the L'Etruria?

A. Thirty-eight feet.”

Testimony of the same witness, page 8 of the Transcript, commencing at Line 16:

“Q. I believe you stated you were the only man on the deck of the boat.

The Court. He claims he was the only man on deck.

Q. Ask him if he had been sounding this whistle or horn before this accident occurred?

A. No sir.

Q. Ask him if he had been making any kind of signal to attract the attention of other boats before this accident occurred?

A. No sir."

Testimony of J. T. Silva, one of Libellant's witnesses, page 18 of the Transcript, commencing at Line 12.

"Q. Where were you at the time of the accident?

A. Down in the hold.

The Court. Was he asleep?

A. Yes, sir."

Testimony of Oscar Peuna, Appellant's witness, cross-examination, page 23 of the Transcript commencing at Line 23:

"Q. Did the Noe G. alter its course from the time the lookout said there was a boat in front until the boats struck?

A. He couldn't change the course, it was too close, but he reversed the engine."

Same witness, page 24 of Transcript commencing at Line 5:

"*The Court.* Did he say they had changed their course?

A. They tried to. They changed the course a little, but didn't change it much. It was too close. They had no time to change it."

Same witness, page 28 of the Transcript, commencing at Line 11:

"Q. The Noe G. was going full speed ahead?

A. On account of the foggy weather, I should

judge it was going about three miles and a half an hour.

Q. What did you mean by saying a while ago it was going ahead then?

A. I mean, we reversed full speed reverse when we seen the other boat. We reversed full speed back."

Testimony of Appellant's witness Doso Peo Pela, page 32 of the Transcript, commencing at Line 23:

"Q. Noe Chappi—did you say anything to Mr. Chappi when you saw the L'Etruria ahead of you?

A. He said—as soon as I saw him, I saw the boat, I told Chappi to reverse the engine full speed.

Q. Did he reverse the engine?

A. Yes."

Same witness, page 33 of the Transcript, commencing at Line 24:

"*The Court.* Did you say anything when you saw the ship ahead—when you saw the L'Etruria?

A. As soon as I saw the boat, I ordered the Noe G. to reverse the engine, and he said it wasn't anywhere that they could give them any side, they were steering right straight they were so close.

Q. What did you do when you saw the L'Etruria?

A. He says, I was hollering that boat is ahead of us to reverse the engine, and so they did, the other party on their boat, so they were going backwards, and their boat came ahead square on the bow without nobody was on the deck.

The Court. Was your boat going backwards when the collision occurred?

A. Yes, sir.

The Court. Do you mean that the engine was going backward, or the boat going backward?

A. He said that the engine was turning backward, and also the boat was going backward.

The Court. The speed forward then was entirely stopped and the ship was moving backward when the collision occurred?

A. He says we were standing, we were going backward when the other boat came right on us.

The Court. How far were your ships apart when your ship stopped going forward?

A. About fifteen feet, but the other boat was going at full speed.

The Court. How fast was your ship going when you saw the L'Etruria?

A. He said they were going at lowest speed from two miles to three miles an hour."

Page 38 of the Transcript, same witness, commencing at Line 12:

"Q. Ask him if he had put his wheel hard over to port, and went to starboard, if he would not have cleared the L'Etruria entirely.

A. He said that it was close, that he couldn't, it wouldn't no good, it was too late."

Appellant's witness Antonio Levaro also testifies as follows, page 41 of the Transcript, commencing at Line 9:

"Q. How far was the L'Etruria from the Noe G. when you first saw it?

A. He said it was about forty feet.

The Court. Who saw it first?

A. The fellow that was on the wheel.

The Court. What did he say?

A. He said, I hollered loud there was a boat ahead of him.

The Court. Tell the words he said.

A. He was hollering aloud, "The boat is ahead, to reverse the engine."

Q. The man at the wheel hollered there was a boat ahead to reverse the engine?

A. Yes, sir.

Q. Who was running the engine at that time?

A. Noe Chappi.

Q. Did he reverse the engine?

A. Yes, sir, right away."

Same witness, page 46 of the Transcript, commencing at Line 28:

"Q. Did the Noe G. change her course at all from the time you first saw the L'Etruria until the two boats struck?

A. He said he was so close we tried to save them, but we were too late.

Q. Did they change their course?

A. He said, it was too late it was all we could do was to reverse the engine and go backward."

Testimony of Noe Chappi, page 48 of the Transcript, commencing at Line 12:

"Q. What were you doing that morning at the time of this accident?

A. He said, he was in the engine room oiling up the engine, and the fellow was at the wheel, he

hollered a boat was in ahead of him, to reverse the engine, so he reversed the engine at full speed.

Q. Who was the fellow who hollered for him to reverse the engine?

A. The man who was at the end, Peo Pela.

Q. Did you reverse the engine?

A. He said as soon as he say it, he reversed the engine right away.

Q. How fast was the Noe G. traveling at the time he called out to you to reverse the engine?

A. About 3 miles.

Q. How far did the Noe G. go after you reversed the engine and the boat stopped and started backwards?

A. From five to six feet.

Q. At the time the collision occurred, was the Noe G. going back wards or ahead?

A. Going backward."

Same witness, page 50 of the Transcript, commencing at Line 1:

"Q. How far was the L'Etruria from the Noe G. when you first saw it?

A. It was about from thirty to forty feet.

Q. Could you see the L'Etruria from where you were working from the engine room?

A. He says as soon as the man on the wheel told me to reverse the engine, I did, I reversed the engine right away, and he jumped up so he could see, and he was about thirty feet off from the L'Etruria."

Same witness, page 53 of the Transcript, commencing at Line 9:

“Q. When you got out and saw the ship, did you think they were about 30 feet apart, or about 20? Were you still going backward?”

A. He says we were going so slow when I reversed the engine, we were going backward when I got out on the deck.

Q. When you got out on the deck, you were going backwards?

A. Yes, sir.

Q. You were going backwards at full speed?

A. Yes, sir.

Q. You were going forward on slow speed?

A. We were going at first slow from $2\frac{1}{2}$ to 3 miles.

Q. How fast were you going backwards when the collision occurred?

A. He says he can't tell the speed going backwards, but the average the boat goes is six miles an hour or seven.”

Defendant and Appellant further contend that they violated no duty which they owed to Libellants and Respondents. In support of this contention, we call the Court's attention to Vol. 3 of the Encyclopedia of the United States Supreme Court Reports by Michie, page 876:

“*First*: LIABILITY FOR COLLISION AS DEPENDENT ON NEGLIGENCE.

A. *In General.* The liability of one vessel for loss of, or damage to another by collision is dependent on the questions where the owner has provided a competent and sufficient force to man the vessel,

and whether those in charge of it at the time of the accident were guilty of negligence, and if neither the owner nor the master and crew were blamable, no liability attaches to them or the vessel.

Brig James Gray vs. Ship John Frazer, 21 How. 184-194, 16 L. Ed. 106;

Sturgis vs. Boyer, 24 How. 110-124, 16 L. Ed. 591;

The Grace Girdler, 7 Wall., 196-203, 19 L. Ed. 113.

“B. *Care Required to Avoid Collision.* The highest degree of caution that can be used is not required to be exercised by those in charge of a vessel in order to avoid collision. It is enough that the care exercised is reasonable under the circumstances such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view—the safety of life and property. That one of the vessels could have done something that she did not do is not sufficient to render her liable for a collision, the question being whether she did all that reasonable prudence required her to do under the circumstances.”

The Nevada, 106 U. S. 154-157, 27 L. Ed. 149;

Goslee vs. Shute, 18 How. 463, 15 L. Ed. 462;

Wilson vs. Barrett, 13 How. 101-108, 14 L. Ed. 68.

It is further contended by Appellant that if the Court should find that the reversing of the engine on the *Noe G.* was a mistake, that it would not even then constitute negligence on the part of the *Noe G.* but would simply

be as deemed by our courts an error in extremis, and that Libellants and Respondents would not be entitled to damages by reason of the same, and we cite in support of this contention, Encyclopedia of the United States Supreme Court Reports, Vol. 3, page 880, *Errors in extremis*.

Where one ship has by wrong maneuvers placed another in a position of extreme danger, such other will not be held to blame if she has done something wrong and has not been maneuvered with perfect skill and presence of mind.

- The Bluejacket*, 144 U. S. 371, 36 L. Ed. 469;
The Benefactor, 102 U. S. 214, 216, 26 L. Ed. 157;
The Elizabeth Jones, 112 U. S. 514, 28 L. Ed. 812;
The Maggie J. Smith, 123 U. S. 349, 31 L. Ed. 175;
The Ottawa, 3 Wall. 268-269, 18 L. Ed. 165;
The Propellor "Genesee Chief" vs. Fitzhugh, 12 How. 443-460, 13 L. Ed. 1058;
The City of New York, 147 U. S. 72, 37 L. Ed. 84;
City of Paris, 9 Wall. 634-638, 19 L. Ed. 751;
The Grace Girdler, 7 Wall. 196, 19 L. Ed. 113;
The Delaware, 161 U. S. 459-470, and a score of other cases holding the same.

Mistakes committed in moments of impending peril by a vessel in order to avoid a catastrophe made imminent by the mismanagement of those in charge of another vessel do not give the latter, if sunk and lost, a claim on the former for any damages.

- The Nichols*, 7 Wall. 656-677, 19 L. Ed. 157;
The Dexter, 23 Wall. 69, 23 L. Ed. 84.

“A mistake by a vessel in changing or keeping

her course, the failure of a steam vessel to slacken speed, stop and reverse, or hailing an approaching vessel instead of ringing the bell as required by the sailing rules, where collision is imminent owing to the fault of the other vessel, are errors in extremis and not attributable to the former vessel as a fault." Encyclopedia of U. S. Supreme Court Reports, Vol. 3, page 881.

"Right to Rely on Performance of Duty. The officers and crew of every vessel have the right to assume that others will do their duty under the rules of navigation and to act upon that assumption.

"When Rules to Prevent Collision are Applicable. The rules of navigation are obligatory upon vessels approaching each other from the time the necessity for precaution becomes and continues to be applicable as the vessels advance so long as the means and opportunity to avoid danger remain. They are not strictly applied to a vessel which is otherwise without fault in cases where the proximity of the vessels is so close that the collision is inevitable." (Encyclopedia U. S. Supreme Court Reports, Vol. 3, page 889.)

"Presumption in Favor of One Vessel Where Fault of other is Shown. Where fault on the part of one vessel is established by uncontradicted testimony and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim and any reasonable doubt with

regard to the propriety of the conduct of such vessel should be resolved in its favor.”

The Umbria, 166 U. S. 404, 4 L. Ed. 1053;
The Ludzvig Holberg, 157 U. S. 60, 39 L. Ed. 620;
The Victory, 168 U. S. 410-423, 42 L. Ed. 519;
The Oregon, 158 U. S. 186, 39 L. Ed. 943;
The City of New York, 147 U. S. 72-85, 37 L. Ed. 84.

The recognized doctrine is thus stated by Mr. Justice Brown in *The Umbria*, 166 U. S. 404-409, 41 L. Ed. 1053. “Indeed, so gross was the fault of *The Umbria* in this connection that we should unhesitatingly apply the rule laid down in *The City of New York*, 147 U. S. 72, 37 L. Ed. 84, and the *Ludzvig Holberg*, 157 U. S. 60, 39 L. Ed. 620, that any doubts regarding the management of the other vessel, of the contribution of her faults, if any, to the collision should be resolved in her favor.” *The Victory*, 168 U. S. 410-423, 42 L. Ed. 519. Where one vessel clearly shown to have been guilty of a fault, adequate in itself to account for the collision, seeks to impugn the management of the other vessel, there is a presumption in favor of the latter which can only be rebutted by clear proof of a contributing fault.

City of New York, 147 U. S. 72, 37 L. Ed. 84;
The Oregon, 158 U. S. 186-197, 39 L. Ed. 943.

“*Effect of Minor Fault of One Vessel.* And a minor fault of one vessel has been held not to make a case for division of damages where such fault bore but a little proportion to the many faults of

the other.” Encyclopedia U. S. Supreme Court Reports, Vol. 3, page 936.

The Great Republic, 23 Wall. 20, 23 L. Ed. 55.

We, therefore, respectfully submit that the judgment in the lower court should be reversed and a judgment given to Defendant and Appellant for its costs herein expended.

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AND

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